

Jim Doyle
Partner

DEFECTIVE WORK CLAIMS

Defective work claims

- Defective work claims are generally made by or on behalf of principals or building owners.
- Defective work claims generally:
 - require rectification of defective work carried out by the contractor; or
 - claim damages from the contractor for breach of contract arising out of defective work.

PRESENT SITUATION

- Contractors right to rectify is not protected
- Value of defects not managed by contract
- Time for notification not covered
- Method of assessment not controlled by contract
- Effect of ownership change not controlled
- Standard contracts deficient
- Standard assessment methods failing

Issues for Defective Work Claims

- Three main issues that relate to defective work claims are: -
 - Timing of the claim;
 - Assessment of the claim;
 - Defence to the claim.

Standard Form Contracts

- Standard Form Contracts generally provide some procedures relating to defective work claims:
- In particular specific provision relating to:
 - Notification of a defective work;
 - Instructions to carry out rectification work;
 - Liability as to cost of rectification work;
 - Principal's right of contractor's failure to carry out rectification works; and
 - Assessment or valuation of cost of rectification works.

Defective work claims prior to practical completion

- Is it a breach of contract?
- How is a defective work claim made during progress of contract?
- When should the rectification or completion of incomplete work be carried out?
- Who is liable for cost of rectification if enhancement is required/preferable?
- What if contractor fails to rectify defective works?
- What is the effect on warranties under the contract?

Defective work claims during defects liability period

- Validity of the notice to rectify defective works
- Whether notice is to rectify defective works or a **variation**
- Reasonableness of time allowed for rectification of defective works
- Principal's right to direct others to carry out rectification of defective works
- Liability for costs of rectification of defective works

Defective work claims after final certificate

- What is the effect of final certification on a defective work claim?
- Does the principal, with no proprietary interest, still have rights to make a defective work claim?
- Are there any effective time limitations to making a defective work claim after final certification ?

Assessment of Claim

- There are three possible methods of assessing damages for breach of contract due to defective work:
 - Cost of rectification
 - Diminution in value
 - Non-pecuniary loss

Cost of Rectification Method

- The High Court's decision in *Bellgrove v Eldridge* is the leading authority on the cost of rectification method of assessing damages for defective work.
- The principal's right to the cost of rectification of defective work is subject only to that which is "necessary" and "reasonable".
- Both being questions of fact.

Diminution in Value Method

- The diminution in value method is damages based on the difference in value between the value of the work under proper performance and actual value of work due to defective work
- The method is applicable when cost of rectification is out of proportion to nature of defect

Non-Pecuniary Loss Method

- Damages are awarded for loss of amenity or non-pecuniary loss as a result of breach of contract for defective works
- Examples:
 - Loss of enjoyment of use of the building
 - Substantial inconvenience and discomfort caused by breach

Defending Defective Work Claim

- Some common defences by contractor to allegation of defective work claims include: -
 - incomplete design;
 - contradictory or confusing details;
 - provision of required information out of sequence;
 - incompatibility of details;
 - work carried out on the instruction of the building owner and/or superintendent;
 - waiver or estoppel on the part of the principal or superintendent;
 - proof of absence of an express term requiring particular quality, no implied warranty; and
 - lack of reliance

Practical Tips

- Some practical tips in preparation for a possible defective works claim are: -
 - establish ambit of contractual responsibility;
 - be clear as to any express and/or implied representation made in documentation relating to and part of the contract as to the quality of workmanship;
 - be aware of any express and/or implied statements in the contract as to the purpose of the works;
 - be clear as to any express, implied and/or actual reliance on the part of the principal as to any of the contractor's obligation, skill or expertise; and
 - establish a contemporaneous documentation procedure to ensure all directions, instructions, notifications, possible waivers are recorded in a timely and relevant manner

PRECAUTIONS

- Add specific terms to control defects
 - Timing of notice and limit to liability
 - Method of assessment – expert not arbitrator
 - Define cost basis of enhancements
 - Define diminution in value as the test post ownership transfer

Conclusion

- Defective work claims may be minimised by clear contractual terms relating to: -
 - Risk allocation;
 - Obligations in respect of standards and quality of work; and
 - Reliance on skill and expertise
 - Procedures for resolving defective work claims.

Disclaimer

Before applying the information provided think hard and pray hard

